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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,)	Case No. CR 08-0160 SI
)	
Plaintiff(s),)	
	)	DEFENDANT FLEET MANAGEMENT
vs.	)	LTD.'S NOTICE OF MOTION AND
	)	MOTION TO UNSEAL DOCUMENTS
JOHN J. COTA, et al.,	)	FILED WITH THIS COURT;
	)	MEMORANDUM OF POINTS AND
Defendant(s).	)	AUTHORITIES IN SUPPORT
	)	THEREOF
	)	Date: September 3, 2008
	)	Time: 2:00 p.m.
	)	Dept.: Courtroom 10, 19 th Floor,
	)	<i>The Honorable Susan Illston</i>

TO THE COURT AND ALL COUNSEL, Notice is hereby given that on September 3, 2008, at 2:00 p.m., or as soon thereafter as the matter may be heard, in Courtroom 10 on the 19th Floor of the above-entitled Court, The Honorable Susan Illston Presiding, Defendant FLEET MANAGEMENT LTD. ("Fleet") will move this Court to unseal all pleadings filed to date in the above-referenced case, or in the alternative, for disclosure of those documents to Fleet.

1 pleadings to Fleet under an appropriate confidentiality order. Fleet seeks this Order so
2 that it may properly prepare a defense to the charges alleged in the Second Superseding
3 Indictment.

4
5 **I. POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO UNSEAL**
6 **PLEADINGS**

7 **A. Material Facts**

8 On June 19, 2008, two separate documents were filed under seal in this case,
9 docket numbers 58 and 59. On that same date the Court granted a Stipulated
10 Amendment to the briefing schedules for Defendant John Cota's previously filed Motions
11 to Sever and Dismiss. The amended briefing schedule called for the United States
12 Opposition Briefs to be filed on July 3, 2008, and any Reply Brief to be filed on or before
13 July 11, 2008.

14 On July 3, 2008, two separate documents were filed under seal in this case, docket
15 numbers 71 and 72. On July 10, 2008, two additional documents were filed under seal,
16 docket numbers 73 and 74.

17 The documents under seal are presumably pleadings related to Defendant John
18 Cota's Motions to Sever and Dismiss.

19 As Fleet has previously indicated to this Court, a defense of the negligence and
20 strict liability based charges in this case will necessarily include evidence that the MV
21 COSCO BUSAN's allision with the San Francisco-Oakland Bay Bridge was proximately
22 cause by Defendant Cota or the failures of various state and federal government
23 agencies to refuse to license Defendant Cota despite knowledge of his condition.

24 Fleet asserts that the documents filed under seal contain material information
25 that will assist in the defense of this case. Fleet would ordinarily have access to any
26 pleadings filed in this case. Fleet is entitled to obtain the pleadings under seal so that it
27 may determine what has transpired in this case to date, to obtain any judicial

1 admissions of the United States or Defendant Cota, and to obtain any potentially
2 exculpatory information contained in those pleadings.

3
4 **II. THERE IS NO COMPELLING INTEREST TO DENY FLEET ACCESS TO
THE SEALED DOCUMENTS**

5
6 Generally, the District Court must make factual findings which support its
7 decision to seal information from the public. *See, Oregonian Publishing Co. v. United*
8 *States District Court*, 920 F.2d 1462, 1466 (9th Cir. 1990). Specifically, secrecy will only
9 be allowed if it serves a compelling interest which is substantially likely to be harmed in
10 the absence of secrecy, and there are no alternatives that would adequately protect this
11 interest. *Id.*; *see also, United States v. Brooklier*, 685 F.2d 1162, 1172 (9th Cir. 1982)
12 ("transcripts of properly closed proceedings must be released when the danger of
13 prejudice has passed").

14 Moreover, even if legitimate grounds existed initially to conceal information, there
15 is no presumption that the information can thereafter remain forever sealed and
16 unavailable to a defendant. In fact, the contrary is true, *i.e.*, secrecy should be
17 maintained only so long as the initial reasons justifying the closure continue to exist. As
18 long as the information remains sealed, "the government bears the continuing burden of
19 justifying the need for secrecy." *United States v. Moten*, 582 F.2d 654, 661 (2nd Cir.
20 1978) (in camera testimony of witnesses should have been released to defendant
21 investigating motion for new trial, even though trial judge believed that the testimony
22 would not be helpful to the defendant).

23 In this case Fleet is a newly added defendant. Prior to its involvement in this
24 case, Defendant Cota obtained a severance of the felony charges from the misdemeanor
25 charges against him. He also made a motion to dismiss that was denied. The United
26 States and Defendant Cota both briefed the issues relevant to both of those motions.
27 Those briefs were sealed. Fleet is entitled to know what has previously transpired in

1 this criminal case that it has recently joined. Failure to allow Fleet access to this
2 information serves no compelling interest, and actually most likely denies Fleet its
3 Constitutional rights.

4
5 **III. FLEET IS ENTITLED TO BOTH FAVORABLE AND UNFAVORABLE
6 EVIDENCE AGAINST IT**

7 Prosecutors have a duty under due process to disclose evidence that is both
8 favorable to the accused and material to either guilt or punishment. *See, United States v.*
9 *Bagley*, 473 U.S. 667, 674, 105 S.Ct. 3375, 3379, 87 L.Ed.2d 481 (1985); *Brady v.*
10 *Maryland*, 373 U.S. 83, 87 (1963). Evidence impeaching the credibility of key
11 government witnesses also falls under the *Brady* doctrine. *See, Bagley*, 473 U.S. at 676;
12 *Giglio v. United States*, 405 U.S. 150, 154 (1972). Failure to disclose such exculpatory or
13 impeachment evidence requires reversal if the evidence "is material in the sense that its
14 suppression undermines confidence in the outcome of the trial." *Bagley*, 473 U.S. at 678;
15 *see also, United States v. Shaffer*, 789 F.2d 682, 688 (9th Cir.1986).

16 In this case, Fleet is entitled to view the favorable or unfavorable information set
17 forth in the pleadings associated with Defendant Cota's Motion to Dismiss and Sever.
18 Specifically, those pleadings may contain information regarding Defendant Cota's
19 medical condition and whether or not he disclosed that condition to the United States.
20 The documents presumably also contain evidence linking the false statement and
21 obstruction allegations against Defendant Cota to the negligence and strict liability
22 allegations. That information is additional evidence in support of Fleet's defense.
23 Moreover, the documents may include information or evidence that the United States
24 intends to use against Fleet. In either case, Fleet is entitled to this information so that
25 it may defend itself.

IV. FLEET IS ENTITLED TO AN OPEN AND FAIR TRIAL

The Sixth Amendment right to an open and public trial is a shared right of the accused and the public, the common concern being the assurance of fairness. *Press-Enterprise v. Superior Court of California for Riverside County*, 478 U.S. 1, 7 (1986). In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury. *Id.* The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. *Waller v. Georgia*, 467 U.S. 39, 45 (1984).

Part of that right to a fair trial includes the right to have access to pleadings filed with the court. Public disclosure of these pleadings will ensure that the truth comes out at trial. The sealed documents at issue may contain judicial admissions of the parties and evidence exculpatory to Fleet. Fleet is entitled to all of the evidence as described above of actions by Defendant Cota and various government agencies.

V. ADEQUATE ALTERNATIVES TO SEALING THESE DOCUMENTS EXIST


If the Court is not inclined to unseal the documents at issue in this Motion, Fleet requests that the Court order them produced to Fleet. The Court could order the parties to keep the documents confidential while allowing Fleet to obtain copies for its review and the preparation of its defense. In addition, the Court could order that no party file the documents or information contained in them unless certain information were redacted.

VI. CONCLUSION

Based upon the foregoing, Fleet respectfully requests that this court issue an order to unseal the documents filed as docket numbers 58, 59, 71, 72, 73, and 74. In the alternative Fleet requests that the Court order disclosure of those documents to Fleet in a manner that protects the confidential nature of the contents yet allows Fleet to obtain

1 material discovery in this case.

2
3 DATED: August 20, 2008



JOSEPH A. WALSH II
MARC R. GREENBERG
JOHN COX
KEESAL, YOUNG & LOGAN
Attorneys for Defendant
FLEET MANAGEMENT LTD.

CERTIFICATE OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 450 Pacific Avenue, San Francisco, CA 94133.

On **August 20, 2008**, I served the foregoing document described as **DEFENDANT FLEET MANAGEMENT LTD.'S NOTICE OF MOTION AND MOTION TO UNSEAL DOCUMENTS FILED WITH THIS COURT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** on the parties in this action as follows:

☒ **CM / ECF:** The document was electronically served on the parties to this action via the USDC Northern District of California CM / ECF system upon electronic filing of above-described document.

Pursuant to California Rules of Court, Rule 201, I certify that all originals and service copies (including exhibits) of the papers referred to herein were produced and reproduced on paper purchased as recycled, as defined by Section 42202 of the Public Resources Code.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **August 20, 2008**, at San Francisco, California.



K'Ann M. Klein

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	Case No. CR 08-0160 SI
)	
Plaintiff(s),)	
)	
vs.	)	[PROPOSED] ORDER GRANTING
	)	DEFENDANT FLEET MANAGEMENT
JOHN J. COTA, et al.,	)	LTD.'S MOTION TO UNSEAL
	)	DOCUMENTS FILED WITH THIS
Defendant(s).	)	COURT
)	
	)	Date: September 3, 2008
	)	Time: 2:00 p.m.
	)	Dept.: Courtroom 10, 19 th Floor,
	)	<i>The Honorable Susan Illston</i>

Defendant FLEET MANAGEMENT, LTD.'s Motion to Unseal Documents Filed With This Court came before the above-entitled Court on September 3, 2008 at 2:00 p.m., the Honorable Susan Illston presiding. The Court, having reviewed all of the pleadings, arguments of counsel, the Court's files herein, and good cause appearing therefore, **HEREBY ORDERS AS FOLLOWS:**

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1 Defendant FLEET MANAGEMENT, LTD.'s Motion to Unseal Documents Filed
2 With This Court is GRANTED. Documents filed as docket numbers 58, 59, 71, 72, 73,
3 and 74 shall be unsealed.

4
5 DATED: _____, 2008

6 _____
7 SUSAN ILLSTON
8 United States District Judge
9

10 Defendant FLEET MANAGEMENT, LTD.'s Motion to Unseal Documents Filed
11 With This Court is GRANTED. Disclosure of docket numbers 58, 59, 71, 72, 73, and 74
12 shall be disclosed to Fleet in a manner that protects the confidential nature of the
13 contents yet allows Fleet to obtain material discovery in this case.

14
15 DATED: _____, 2008

16 _____
17 SUSAN ILLSTON
18 United States District Judge
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28

CERTIFICATE OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 450 Pacific Avenue, San Francisco, CA 94133.

On August 20, 2008, I served the foregoing document described as **[PROPOSED] ORDER GRANTING DEFENDANT FLEET MANAGEMENT LTD.'S MOTION TO UNSEAL DOCUMENTS FILED WITH THIS COURT** on the parties in this action as follows:

☒ **CM / ECF:** The document was electronically served on the parties to this action via the USDC Northern District of California CM / ECF system upon electronic filing of above-described document.

Pursuant to California Rules of Court, Rule 201, I certify that all originals and service copies (including exhibits) of the papers referred to herein were produced and reproduced on paper purchased as recycled, as defined by Section 42202 of the Public Resources Code.

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Executed on August 20, 2008, at San Francisco, California.



K'Ann M. Klein